No. 22394

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAWAIIAN PARADISE PARK CORPORATION, a Hawaii corporation, Appellant, vs. FRIENDLY BROADCASTING CO., INC., an Ohio corporation, Appellee.	SEP 1 5 1968

On Appeal from the United States District Court
for the District of Hawaii

APPELLANT'S REPLY BRIEF

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STATEMENT IN REPLY TO
FRIENDLY'S REFERENCES TO EVIDENCE

In Appellee's Answering Brief, Friendly has referred without discussion to evidence which it claims supports the findings of fact which Hawaiian has designated as Specifications of Error Nos. (1), (4) and (7). The evidence referred to by Friendly does not support said findings of fact for the reasons already discussed in Appellant's Opening Brief.

In reply to the evidence referred to by Friendly in support of Specification of Error No. 1, Hawaiian incorporates herein by reference the Statement of the Case found in Appellant's Opening Brief, Pages 1 through 12, inclusive, and the additional statements of fact and discussion at Pages 18 through 27, inclusive, therein.

In reply to the references to evidence by Friendly as to Specification of Error No. 4 on Pages 3 and 4 of its

Answering Brief, Hawaiian incorporates herein by reference, in addition to its Statement of the Case referred to above, the additional statements of fact and discussion found on Pages 27 through 37, inclusive, of Appellant's Opening Brief.

Hawaiian has complied with Paragraphs 2(d) and (e) of Rule 18 of this Court in including in its Opening Brief a Specification of Errors, which states as particularly as may be wherein certain findings of fact and conclusions of law are alleged to be erroneous and which is followed by a Summary of Argument and a concise Argument of the case, which points out grounds for each specification of error. While each specification of error is not separately and chronologically discussed, each is specifically dealt with at some point in the Opening Brief. In any case, Hawaiian, if it has failed to discuss any of the specifications of error in its Opening Brief or this Reply Brief, nevertheless expressly reserves its right to orally argue the same. Western Nat. Ins. Co. v. Le Clare, 163 F.2d 337 (9th Cir., 1947).

ARGUMENT

I. HAWAIIAN'S WASHINGTON ATTORNEY, A. HARRY BECKER, HAD NEITHER EXPRESS, IMPLIED NOR APPARENT AUTHORITY TO ENTER INTO OR BIND HAWAIIAN BY THE AGREEMENT SET FORTH IN THE DECEMBER 16 LETTER, WHICH PURPORTED TO EXTEND INDEFINITELY THE TERMINATION DATE OF THE BASIC AGREEMENT.

A. EXPRESS AUTHORITY.

Express authority, whether oral or written, must be, according to Friendly's quotes, "distinct", "plain", "direct"

and "explicit". One searches in vain, however, for such authority in the transcript or the record.

Indeed, the transcript reveals that Mr. Becker himself admitted that he had no express authority to enter into the terms found in the December 16 letter:

> "Q Did you ever ask Mr. Watumull or any other officer of Hawaiian Paradise Park Corporation for authority to sign the December 16 letter?"
>
> "A [Mr. Becker] No." (Tr. 237)

Before the December 16 letter was signed by Mr. Becker, the letter was neither read to Mr. Watumull nor sent to Hawaiian for signature or approval (Tr. 233-234). After the letter was signed, Mr. Becker did not inform Mr. Watumull of its existence (Tr. 243-44), did not read it to the latter, and did not even forward a copy to Hawaiian (Tr. 233-234).

Nowhere in the transcript does Mr. Becker state that he was given express authority to sign and to bind Hawaiian to the terms of the December 16 letter. Mr. Becker did testify that he and Mr. Dobin had reached a verbal agreement prior to December 16, 1966, to the effect that Hawaiian would be bound up to an initial decision, not through a final decision (Tr. 217-218). Admitting that he had not discussed its terms with Mr. Watumull (Tr. 225-226), Mr. Becker, nevertheless, signed the December 16 letter which bound Hawaiian beyond an initial decision. Express authority cannot be based upon such facts, yet on Page 7 of its Answering Brief, Friendly points to evidence from which

it claims the judge could reasonably have inferred that Hawaiian had knowledge of the December 16 letter, even though as mentioned above, Mr. Watumull testified he had no knowledge of the December 16 letter until April 19, 1967 (Ex. D-9), after Hawaiian had written its termination letter (Ex. P-10).

The evidence referred to on Page 7 of the Answering Brief is irrelevant to the issue of Hawaiian's knowledge of the December 16 letter:

> Paragraph 1 on Page 7. Nothing can be made of the presence of Hawaiian's attorney at the F.C.C. hearings, for Hawaiian's cooperation was necessary under the basic agreement. (Ex. P-1, Page 16; R. 27)
>
> Paragraph 2. The fact that two of Hawaiian's employees testified before the hearing examiner cannot establish Hawaiian's knowledge of the December 16 letter, especially when one of the employees stated that he had testified and was back in Honolulu by December 13 (Tr. 365).

The actions of Hawaiian as stated in Paragraphs 3, 4, 5 and 6 were not inconsistent with a lack of knowledge of the December 16 letter, nor can they establish by inference any such knowledge on the part of Hawaiian.

Paragraph 7. As for the $5,000 attorney's fees paid to Mr. Becker, Mr. Watumull did not learn of the fact that such fees had been paid until May 15, 1967 (Tr. 302). Mr. Becker had, moreover, informed Mr. Watumull in October or November, 1966, that Friendly

would pay Mr. Becker's legal fees for the hearings. The hearings were not completed until early January, yet on December 12, 1966, before the December 16 letter had been signed, a check was drawn by Friendly payable to Mr. Becker in the amount of $2,500 (Ex. D-7). Another check dated December 29, 1966, also in the amount of $2,500, was subsequently given to Mr. Becker (Ex. D-7), before the hearings were completed.

B. IMPLIED AUTHORITY.

The facts of this case neither raise the issue of implied authority nor support a finding of the same. The signing of the December 16 letter cannot be said to constitute a merely "incidental" act in the absence of any oral express authority to enter into the agreement embodied in the December 16 letter.

Contrary to Friendly's statements in Paragraph (2) on Page 9 of its Answering Brief, the past actions of Hawaiian do not support a finding of implied authority. Each of the past actions referred to had either been expressly authorized by Hawaiian or expressly ratified. Furthermore, the authority to negotiate cannot be claimed to include implied authority to enter into a detrimental written agreement binding upon a principal with no knowledge of the agreement (see discussion and authorities in Appellant's Opening Brief, pages 21-27, 29-30).

C. APPARENT AUTHORITY.

Friendly supplies extensive quotations on apparent authority and cites and discusses several cases dealing with situations in which apparent authority was in issue. All of the cited cases are inapposite. The cases deal for the most part with ordinary sales cases and are not applicable to the instant case. None of the cited cases involves the apparent authority of an attorney.

No indicia of apparent authority are singled out in discussion by Friendly except that Hawaiian was required by distance, F.C.C. rules, and its corporate status to retain counsel. Hawaiian, on the other hand, has cited in its Opening Brief (pp. 28-29) several indicia of apparent authority upon which Mr. Dobin claims to have relied, none of which, taken separately or together can establish the requisite apparent authority. In that discussion Hawaiian cites numerous authorities which confirm that the mere employment and retention of an attorney, such as Mr. Becker, does not confer apparent authority on the attorney to enter into agreements such as that found in December 16 letter (Opening Brief, pp. 29-30).

II. SPECIFIC PERFORMANCE.

Friendly now states that, on the basis of Mr. Courtney's $250,000 approximation of the value of the fixed assets which Hawaiian agreed to sell, $300,000 should be the value.

to be applied to the operating license (Answering Brief, p. 16). No testimony supports such a valuation for the operating license and Mr. Courtney did not give the operating license any such value (Tr. 11-14). Friendly has not shown, moreover, whether Mr. Courtney would even have been qualified to give an evaluation of the operating license. Any statements as to the value of the operating license are, therefore, sheer conjecture and of no probative value.

The fact that Honolulu, Hawaii, is allotted only four commercial channels and one educational channel does not by itself establish the uniqueness of the chattel upon which the right of specific performance must be founded. No other testimony as to what made the particular channel involved unique was adduced at trial.

III. HAWAIIAN HAS NOT WAIVED ITS RIGHT TO BE HEARD ON APPEAL.

Hawaiian hereby resubmits its Answer to Appellee's Motion to Dismiss Appeal, which motion was filed herein on January 8, 1968, and incorporates herein by reference said answer, served herein on Appellee's attorneys on January 12, 1968, and filed herein subsequent thereto, together with its supporting statement of facts, memorandum of points and authorities and exhibits.

CONCLUSION

There is insufficient evidence in the record to sustain the District Court's holding that Mr. Becker had express,

implied or apparent authority to enter into or bind Hawaiian by the agreement set forth in the December 16 letter.

If this Court sustains the holding that the December 16 letter is binding upon Hawaiian, then the agreement should be found, nevertheless, to have been terminated according to its clear and unambiguous terms by Hawaiian's letter of September 15, 1967.

The Judgment herein be reversed and an order entered to the effect that the basic agreement was terminated on April 17, 1967, or in the alternative, on September 15, 1967, and that Hawaiian be permitted to prove its counterclaim in either case.

If this Court holds that neither termination was effective, the case should be reversed and remanded on the grounds that Friendly did not prove that it was entitled to specific performance and Friendly should be relegated to remedy of its damages at law, if any.

Dated: Honolulu, Hawaii; September 3, 1968.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN JUBINSKY